DATE: June 1, 1998
CASE NO. 96-INA-446

In the Matter of:

CONCINA SUPER
Employer

On Behalf of:

DELIA MACIAS-LUNA
Alien

APPEARANCE: Susan M. Jeannette, Lay Representative[1]
For the Employer

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

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[1]Employer's Brief and Motion for Remand was signed by "Susan Jeannette, for Employer of Record." Ms. Jeannette also signed an affidavit, as "Immigration Processor, Attorney Supervised." However, she failed to identify the identity of the supervising attorney (AF 7).

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On November 15, 1994, Concina Super ("Employer") filed an application for labor certification to enable Delia Macias-Luna ("Alien") to fill the position of Cook, Specialty, Foreign Food. The job duties for the position, as stated on the application, are as follows:

> Cook preparing a wide range of Mexican menu items. Use and knowledge of standard restaurant equipment and utensils. Able to speak Spanish as the owner's (sic) are newly legalized immigrants under IRCA, 1986 and only speak Spanish as their native language. Also, this restaurant is located inside a Hispanic compound with shops that cater to the Hispanic people and 95% of the customers are Hispanic. In this restaurant, the people sit right in front of the cook and order their food directly from the cook, so he must be Spanish speaking.

(AF 43).

The stated job requirements for the position are: two years of experience in the job offered or in the related occupation of cook, and, "(m)ust be able to obtain a County of San Diego Dept. of Health required Foodhandler's card." (AF 43).

In a Notice of Findings ("NOF") issued on December 5, 1995, the CO proposed to deny certification on the grounds, inter alia, that the Employer had demonstrated a lack of good faith recruitment by rejecting three qualified U.S. applicants for other than lawful job-related reasons (AF 37-38).[2]

The Employer submitted its rebuttal on or about February 21, 1996 (AF 29-36). The CO found the rebuttal unpersuasive regarding the above stated grounds and issued a Final Determination denying certification, dated April 9, 1996 (AF 26-28) and May 6, 1996 (AF 20-22), respectively.

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[2]The CO cited the provisions of 20 C.F.R. §656.24(b)(2)(ii). The more appropriate regulations appear to be 20 C.F.R. §656.21(b)(6) and §656.20(c)(8). Nevertheless, the Employer was clearly placed on notice of the underlying deficiency by the plain wording of the Notice of Findings (AF 38).

On or about May 13, 1996, the Employer filed a motion for reconsideration and/or a request for review, together with an Amendment to the ETA 750B, Item 15, and an affidavit (AF 2-7). By letter dated June 12, 1996, the CO denied Employer's request for reconsideration and forwarded this matter to the Board of Alien Labor Certification Appeals for review (AF 1).

Discussion

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such good faith requirement is implicit. H.C. LaMarche Enterprises, Inc., 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the present case, the CO determined that the Employer, through its actions, effectively rejected three qualified U.S. applicants; namely, Ismael Hernandez, Diana Cruz, and Jose Hurtado (AF 38,27-28,21-22).

In the Notice of Findings, the CO noted that U.S. applicants Hernandez, Cruz, and Hurtado had over three, four, and five years of experience, respectively. Accordingly, the CO concluded that all of the foregoing U.S. applicants appear to meet the stated minimum requirements for the job. The CO questioned Employer's good faith recruitment efforts and instructed the Employer to rebut the statements of each of the applicants on their questionnaires. In pertinent part, the CO stated:

> **FINDING:**
> Lack of good faith recruitment.
> Jose Hurtado's questionnaire states when he arrived at the place of business the employer, Mr. Sanchez was too busy to attend to him, so he was not interviewed.
>
> Ismael Hernandez states he was not contacted by the employer...
>
> Diana Cruz stated in her questionnaire that she went to the place of business but there was no restaurant but a mini market.

CORRECTIVE ACTION
Submit rebuttal.

(AF 38).

The Employer's rebuttal, in pertinent part, consists of an explanatory letter, dated February 21, 1996, signed by Fernando Sanchez, Owner Super Concina (AF 29-32), and copies of photographs of the exterior of the mini-mall and of Super Concina (AF 35-36).

In the explanatory letter, dated October 31, 1994, Mr. Sanchez stated, in pertinent part: Mr. Hurtado arrived four hours late during lunch hour and was not interviewed. Ms. Cruz came to a mini-mall, not a mini-mart. Because she did not come inside of the mall, she did not see the restaurant. "Obviously she must have decided that she was disinterested in interviewing for this position and did not want to pursue this any further or she would have come in and located the restaurant." Mr. Hernandez does not want to work as a cook any more (AF 29-32).[3]

In the Final Determination, the CO stated, in pertinent part, that the Employer "failed to justify that the applicants Ismael Hernandez, Jose Hurtado and Diana Cruz are not qualified and that the recruitment was completed in good faith. Based on this information the labor certification is denied." (AF 27-28). Regarding U.S. applicants Hurtado and Cruz, we agree.[4]

Although a written assertion constitutes documentation, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Gencorp, 87-INA-659 (Jan. 13, 1988)(en banc); A.V. Restaurant, 88-INA-330 (Nov. 22, 1988); Carl Joecks, Inc., 90-INA-406 (Jan. 16, 1992).

The record contains copies of letters, dated April 5, 1995, directing the U.S. applicants to appear for an interview on Wednesday, April 12, 1995 at 7:00 AM (AF 79,86,87). Of the three seemingly qualified U.S. applicants, two (Hurtado, Cruz) clearly received the letters (AF 84,88). On the other hand, Mr. Hernandez states that he was never contacted (AF 80). As stated above, for the purpose of rendering a decision herein, our focus will be on the actions of the Employer

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[3]Mr. Sanchez also asserted that "none of these 'cooks' have any experience working in authentic Mexican restaurants," and cited the use of Farmer John Lard as the "most outstanding difference" in cooking authentic Mexican cuisine (AF 31). Since two years of experience in the related occupation of "cook" is listed as an alterative experience requirement, the alleged absence of experience in Mexican cuisine is inconsequential. Moreover, the resumes of the U.S. applicants certainly do not preclude the possibility that they have experience in Mexican cuisine (AF 81,85,90). In fact, Mr. Hurtado's resume indicates that he had such experience (AF 90),

[4]In view of our finding with respect to Mr. Hurtado and Ms. Cruz, we will not address the conflict between the Employer and Mr. Hernandez as to whether or not the latter was contacted by Employer for an interview (AF 68,79,80).

regarding the applications of Mr. Hurtado and Ms. Cruz.

As discussed above, the Employer alleged, in its rebuttal, that Mr. Hurtado was not interviewed at all, because he arrived four hours late during an inconvenient time (AF 29). Upon review, however, we find that the Employer failed to even mention the lateness issue in its report of recruitment (AF 68). This apparent inconsistency undermines the Employer's credibility regarding this issue.

Moreover, even if we accept the Employer's belated assertion that Mr. Hurtado was not interviewed due to the latter's lateness, the Employer acknowledges that he did belatedly appear for the interview on the date requested by Employer. While it may be understandable for the Employer to postpone the interview, if Mr. Hurtado appeared during a busy lunch hour, it does not explain the Employer's failure to reschedule the interview of a seemingly qualified U.S. applicant who was apparently interested in the job opportunity. Moreover, the fact that Mr. Hurtado may have obtained employment at the Olive Garden Restaurant, as suggested by the Employer in its report of recruitment results (AF 68) and rebuttal (AF 30), does not address the issue of whether he was qualified, willing, and available at the time of recruitment for this job opportunity.

Similarly, Ms. Cruz attempted to attend the April 12, 1995 interview, but apparently was unable to find the restaurant, because unbeknownst to her, it is located within a mini-mall. We note that the letters to the U.S. applicants do not contain the Employer's telephone number. Furthermore, while the address is listed, there is no indication that the restaurant is located within a mini-mall. Accordingly, the Employer failed to provide information which may have been helpful to the U.S. applicants. More importantly, we find the Employer's supposition that Ms. Cruz obviously was disinterested in the position, because she failed to find the restaurant within the mini-mall to be unpersuasive (AF 30). To the contrary, Ms. Cruz's response to the questionnaire is credible, and not directly challenged by the Employer. Specifically, Ms. Cruz noted that an interview was scheduled for April 12, 1995; however, no one interviewed her, because she found no restaurant at the address; instead, it was a mini-market (AF 84).

In summary, at least two seemingly qualified U.S. applicants tried to follow-up with the Employer's request for interviews on April 12, 1995, and neither were interviewed due to confusion over the time and location of the interview, respectively. With respect to Mr. Hurtado, the Employer should clearly have known that the U.S. applicant was interested in being interviewed, since he, in fact, appeared for the interview. In such case, the Employer is obligated to investigate the applicant's credentials further, in order to establish that there were no qualified, willing, and available U.S. applicants. Gorchev and Gorchev Design, 89-INA-118 (Nov. 29, 1990)(en banc). Even assuming the veracity of the Employer's statement on rebuttal regarding the lateness of Mr. Hurtado, it behooved the Employer to interview Mr. Hurtado after the busy lunch hour rush and find out if there was a legitimate reason for his late arrival, and/or to reschedule the interview for a later date. Similarly, under the particular circumstances of this case, in which the scarcity of information provided by the Employer in its letter (AF 86) may have

contributed to Ms. Cruz's inability to locate the restaurant within a mini-mall, the Employer should have taken reasonable steps to contact Ms. Cruz and reschedule the interview. Interestingly, the Employer reported that he "tried to get back in touch with Diana Cruz to find out why she did not come to her interview, but she does not have a message machine and she does not answer her telephone." (AF 68). It is unclear, however, how often and at what times of the day the telephone calls were attempted. Moreover, the resume of Ms. Cruz includes two different telephone numbers (AF 85). Finally, the Employer could have, again, tried to contact her by mail, and directed her to contact Employer at a specified telephone number. Accordingly, we find that the Employer has failed to establish good faith in its recruitment efforts. See, e.g., Suniland Music Shoppes, 88-INA-93 (Mar. 20, 1989)(en banc); Joshua Klein Refrigeration, 89-INA-194 (Dec. 11, 1990); Orland Truck Stop, 94-INA-612 (July 23, 1996).

In view of the foregoing, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.